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In the Supreme Court of the United States

OCTOBER TERM, 1959

MITCHELL S. MOHR, an Individual Trading and Doing Business as NATIONAL RESEARCH COMPANY, and SYDNEY FLOERSHEIM, an Individual Trading and Doing Business as S. FLOERSHEIM SALES COMPANY, PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. 1-10) is reported at 272 F. 2d 401. The opinion of the Federal Trade Commission (R. 43-46)[1] has not yet been reported.

[1] References to the Transcript of Record printed in the court below are designated "R. ——").

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered November 16, 1959. Rehearing was denied on December 29, 1959. The petition for a writ of certiorari was filed on February 8, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Whether the Federal Trade Commission properly concluded that the public interest required reopening a cease and desist order proceeding to insure affirmative disclosure of the purpose of petitioner's debtor tracing forms in order to avoid misleading and deceiving the recipients.

STATUTE INVOLVED

The pertinent provision of the Federal Trade Commission Act (52 Stat. 111, 15 U.S.C. 45(b)) is set forth in the petition at p. 3.

STATEMENT

The petitioners are in the business of obtaining information about delinquent debtors for the benefit of creditors. Their method of operation is to send cards to the last known address of the delinquent requesting the desired information. In *Mitchell S. Mohr*, 52 F.T.C. 1466, the Commission found that the petitioners' cards were deceptive and misleading and on June 1, 1956, entered an order requiring the petitioners to cease and desist from

> [u]sing or placing in the hands of others for use, any form, questionnaire, or other material printed or written, which represents, directly or by implication, that the purpose for which the information is requested is other than that of obtaining information concerning delirquent debtors; (R. 3-4).

The petitioners submitted revised forms to the Compliance Division of the Commission (R. 8-11) and were advised by the Commission's General Counsel on August 1, 1956, that these forms appeared to comply with the order (R. 13). However, it was soon found that the revised forms continued to create misunderstandings among recipients and the petitioners' counsel was informed by letters of October 2 and October 12, 1956, that the forms the petitioners were using and intended to use were being submitted to the Commission for a consideration of their adequacy under the cease and desist order (R. 140). By letters of February 13 (R. 141-142) and March 14, 1957 (R. 142-143), petitioners were informed that the Commission took the position that its order was broad enough to prohibit all forms which failed to state that they were for the purpose of debt collection and that continued use of the present forms would result in adverse action by the Commission.

When the petitioners nevertheless persisted in using the forms, the Commission on February 6, 1958, ordered petitioners to show cause why the outstanding order should not be modified to preclude the petitioners from

> [u]sing, or placing in the hands of others for use, any forms, questionnaires or other materials,

printed or written, which do not clearly reveal that the purpose for which the information is requested is that of obtaining information concerning delinquent debtors (R. 3-5).

After briefing and oral argument (R. 48-83), the Commission remanded the case to a hearing examiner to receive evidence on the question of whether, under Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), "conditions of law or fact ha[d] so changed as to require [modification of the prior cease and desist order] or if the public interest" required such action (R. 18-19). After such hearing, the examiner certified the record to the Commission along with a recommended decision (R. 27-34) concluding that the cards being used by the petitioners tended to mislead and deceive recipients, and that, since confusion and controversy had arisen as to the compliance required by the outstanding cease and desist order, "the public interest demands that said paragraph be revised [in the manner proposed in the Commission's notice of February 6, 1958] to insure, beyond question, that such deception shall cease" (R. 34). The Commission unanimously agreed with the examiner's recommendation in an Opinion (R. 43-46) and Order (R. 42) issued on November 14, 1958. The Court of Appeals for the Ninth Circuit affirmed (Pet. App. 1-10).

ARGUMENT

The instant case presents no novel or significant question of law but only the application of established principles to a particular fact situation. It

has been uniformly held, in all circuits in which the matter has arisen, that the sale and distribution of "skip-trace" forms and cards of the type involved here constitute unfair or deceptive acts or practices in commerce within the prohibitions of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45 (a). See *National Clearance Bureau* v. *Federal Trade Commission*, 255 F. 2d 102 (C.A. 3); *DeJay Stores, Inc.* v. *Federal Trade Commission*, 200 F. 2d 865 (C.A. 2); *Bennett* v. *Federal Trade Commission*, 200 F. 2d 362 (C.A.D.C.); *Rothschild* v. *Federal Trade Commission*, 200 F. 2d 39 (C.A. 7), certiorari denied, 345 U.S. 941; *Silverman* v. *Federal Trade Commission*, 145 F. 2d 751 (C.A. 9). In a number of these cases, *National Clearance Bureau*;[2] *Bennett*; and *Rothschild*, all *supra*, the Commission, as in its modified order here, required an affirmative disclosure that the purpose of the cards was to collect debts. See *Haskelite Mfg. Corp.* v. *Federal Trade Commission*, 127 F. 2d 765 (C.A. 7).

It is equally well settled that the choice of a remedy and, accordingly, the scope of a cease and desist order, is particularly within the informed discretion of the Commission, and may, in appropriate circumstances, extend beyond prohibiting the precise illegal action existing in the past. See *Federal Trade Commission* v. *Mandel Bros., Inc.*, 359 U.S. 355, 392-393; *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 611; *Federal Trade Commission* v. *Ruber-*

[2] See *National Clearance Bureau*, F.T.C. Docket 6648, October 31, 1957, (not reported, but see CCH Trade Reg. Rep. 1957-1958 Transfer Binder), §26,830 at p. 36,105).

oid Co., 343 U.S. 470, 473; *National Labor Relations Board* v. *Express Publishing Co.*, 312 U.S. 426, 436. Where, as here, actual operation under a cease and desist order results in continuing deception as to the purpose of the inquiry being made through the petitioners' cards, a finding that the public interest requires its modification to prevent such deception is clearly appropriate. This is particularly true in view of the Commission's interpretation of its original order, of which the petitioners had been previously advised, as in fact requiring an affirmative disclosure of the purpose of the petitioners' forms. The petitioners contend that the record at the second hearing does not support the finding of continued deception. However, it is apparent, as the court below held (Pet. App. 10), that the forms themselves, as well as the stipulated fact that approximately 80,000 of the 700,000 forms sent to defaulting debtors during the first six months of 1958, were returned by the addressees (R. 137), provides adequate support for the Commission's finding, without reference to the testimony of the twelve witnesses to which petitioners objected. In any event, this is a purely factual question presenting no issue for review by this Court.

CONCLUSION

The decision below is correct and presents no question meriting further review. The petition for writ of certiorari should be denied.

Respectfully submitted,

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